Supreme Court, U. S.
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No. 80-531
IN THE

Supreme Court of the United States

October Term, 1980

BERENICE T. SCHNEIDER,

Petitioner,

vs.

THOMAS D. BOWES, BOWES MANAGEMENT CO., BOWES-ELGIN REALTY CO., BOWES-DUNDEE REALTY COMPANY and ROBERT J. CAMPBELL,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Brief of Respondents Thomas D. Bowes, Bowes Management Co., Bowes-Elgin Realty Co., and Bowes-Dundee Realty Company, In Opposition

KENNETH L. KING, ESQ.,
SULLIVAN, JONES & ARCHER,
600 "B" Street,
San Diego, Calif. 92101,
(714) 236-1611,
Attorney for Respondents, Thomas D. Bowes, Bowes Management Co., Bowes-Elgin Realty Co., and Bowes-Dundee Realty Company.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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Respondents, Thomas D. Bowes, Bowes Management Co., Bowes-Elgin Realty Co., and Bowes-Dundee Realty Company pray that Berenice T. Schneider's Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit be denied.

Summary of Argument.

Contrary to petitioner's suggestion, the Ninth Circuit Court of Appeals did not mention the doctrine of invited error or waiver of defects in a jury verdict in its memorandum decision. Because there is no rational basis for a writ of certiorari to be granted, the petition is frivolous and damages should be granted these respondents.

ARGUMENT

I.

There Is No Basis upon Which This Petition for Writ of Certiorari Should Be Granted.

Berenice T. Schneider's Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit is frivolous. Only an imaginative and contorted reading of the Ninth Circuit's memorandum decision enables Schneider to present even a colorable claim that the requested writ should be granted.

Petitioner argues that the Ninth Circuit's memorandum decision is in conflict with decisions of its own and with decisions of the Eighth Circuit with respect to the "doctrine of invited error and waiver of errors in the form of a jury verdict." Petition for Certiorari at 7. The Ninth Circuit's memorandum decision neither discusses nor mentions these issues. The specific holding of the Ninth Circuit Court was, "We reverse the judgment against Campbell, Bowes, and the corporations, because we find the jury verdict hopelessly ambiguous." Appendix A to Petition for Certiorari at 3. Continuing, the court said,

> From our examination of the jury verdict and the trial transcript, we find the damage award hopelessly ambiguous. In such a case, a reversal is required. . . . The trial court interpreted the jury verdict as a separate judgment against each of the defendants, including the corporate defendants whose liability derives solely from the acts of another defendant. Such an interpretation of the verdict cannot stand, because derivative liability is necessarily joint and several. [Citations omitted.]

Appendix A to Petition for Certiorari at 4-5.

Nowhere does petitioner challenge this legal analysis. Rather, this petition for certiorari is predicated upon a conjured factual scenario, a scenario never accepted by the lower courts. It is this strawman against which petitioner tilts. Such a ploy highlights the frivolous nature of this petition. There is no legal error for this Court to review. None of the criteria of Supreme Court Rule 17 are even implicated.

The Ninth Circuit, after thoroughly analyzing the record in this case, has properly applied the law. Petitioner nowhere disputes this. Rather, petitioner merely wishes for different facts so that a different rule of law could be applied. In other words, petitioner would transform this Court into merely another tribunal of errors and appeals, contrary to its constitutional mission. As stated by Mr. Justice Holmes on behalf of the Supreme Court: "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). Petitioner's strawman strategem runs counter to the very essence of the function of this Court and exposes the frivolous nature of this petition.

Even assuming for purposes of argument that the Ninth Circuit did decide an issue relating to the doctrine of invited error and waiver of defects in a verdict, it did not discuss such issues in its memorandum. Thus, the presumption is that the court applied the correct law, not that it created a new rule of law which puts it in conflict with other circuit courts of appeals. *See Walling v. Jacksonville Paper Co.*, 317 U.S. 565, 569-570 (1943); *Berenter v. Staggers*, 362 F.2d 971, 972 n.2 (D.C. Cir. 1966).

Such a presumption has even greater validity when taken in conjunction with the fact that the decision of the Ninth Circuit was a Memorandum rather than an Opinion. In such an instance, the court's decision is not intended for publication and "shall not be regarded as precedent and shall not

be cited to or by [the Ninth Circuit] court or any district court of the Ninth Circuit. . . .'' *See* Rules of the United States Court of Appeals for the Ninth Circuit, Rule 21 set out in full in Appendix A hereto.

Thus, the assertion of a conflict among various courts as a result of this decision is fallacious. Again, the frivolity of this petition is obvious.

II.

Because Schneider's Petition Is Frivolous, Damages Should Be Assessed on Behalf of These Respondents.

Petitioner has come before this Court with a patently frivolous petition for writ of certiorari. Supreme Court Rule 49.2 provides that: ''When an appeal or petition for writ of certiorari is frivolous, the Court may award the appellee or the respondent appropriate damages.'' This rule should be applied to the instant petition.

It is difficult to conceive of a more frivolous petition than the instant one. The sole predicate for this petition is the strawman averments raised by petitioner. In short, the petition contains nothing of substance. Damages should be granted respondents for the pains incurred in responding to this frivolous petition.

Damages are particularly appropriate given that this is not the first time that this litigant has abused the judicial process to multiply proceedings and harass respondents in this action. As the Ninth Circuit explicitly held, petitioner improperly procured a prejudgment writ of attachment against respondent Bowes and further improperly procured a preliminary injunction which further infringed upon that respondent's rights to his property. Appendix A to Petition for Certiorari at 8-9.

This Court has continually expressed its disapproval of litigants who needlessly multiply and delay judicial proceedings. *See Roadway Express, Inc. v. Piper*, 100 S.Ct. 2455 (1980). Moreover, this Court has long since noted that "the only way to discourage frivolous appeals and writs of error is by the use of our power to award damages. . . ." *Whitney v. Cook*, 99 U.S. 607 (1879). Because the instant petition can be characterized only as frivolous, damages should be awarded to respondents.

Respondents should be awarded damages in the amount of One Thousand Five Hundred Dollars ($1,500.00). Such an amount would fairly compensate respondent for the expenditures incurred in responding to the instant frivolous petition. As stated in *Furbee v. Vantage Press, Inc.*, 464 F.2d 835, 837 (D.C. Cir. 1972): "Justice. . . . requires that the costs of this appeal, including the expense of printing Appellee's brief, and reimbursement for reasonable attorney's fees, be awarded. . . . ." *Cf.*, Advisory Committee Notes to Rule 38 of the Federal Rules of Appellate Procedure (Appellate Rule extremely similar to Supreme Court Rule 49.2 has been authoritatively construed to provide for awarding of costs and attorney's fees). Damages should be granted to these responding parties.

Conclusion.

Because of the frivolous nature of Schneider's petition for a writ of certiorari, her petition should be denied and damages should be granted these respondents in the sum of $1,500.00.

DATED: October 30, 1980.

Respectfully submitted,

KENNETH L. KING,

Attorney for Respondents Thomas D. Bowes, Bowes Management Co., Bowes-Elgin Realty Co., and Bowes-Dundee Realty Company.

APPENDIX A.

RULE 21. Form and Publication of Disposition of Cases.

(a) Opinions, Memoranda, Orders; Publication. Each written disposition of a matter before this court shall bear under the number in the caption an appropriate label, that is, OPINION, MEMORANDUM, or ORDER.

A written reasoned disposition of a case which is intended for publication is an OPINION of the Court. It may be an authored opinion or a per curiam opinion. A written reasoned disposition of a case which is not intended for publication is a MEMORANDUM. Any other disposition of a matter before the Court is an ORDER. An ORDER or MEMORANDUM shall not reveal its author, nor shall its authorship be designated "Per Curiam."

PUBLICATION means making available for reporting by legal publishing companies, or for distribution to regular subscribers, written disposition which have been printed as slip opinions, or copies of which have been prepared by any other means.

Publication as a matter of course shall apply only to opinions.

(b) When Disposition to be by Opinion. Subject to subsection (d) hereof, a case shall not be disposed of by written opinion for publication unless it:

(1) Establishes, alters, modifies or clarifies a rule of law, or

(2) Calls attention to a rule of law which appears to have been generally overlooked, or

(3) Criticizes existing law, or

(4) Involves a legal or factual issue of unique interest or substantial public importance, or

(5) Relies in whole or in part upon a reported opinion in the case by a district court or an administrative agency, or

(6) Is accompanied by a separate concurring or dissenting expression, and the author of such separate expression desires that it be reported or distributed to regular subscribers.

(c) Disposition as Precedent. A disposition which is not for publication shall not be regarded as precedent and shall not be cited to or by this court or any district court of the Ninth Circuit, either in briefs, oral argument, opinions, memoranda, or orders, except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel.

(d) Designation for Publication. A disposition other than an opinion may be specially designated for publication by a majority of the judges acting and when so published may be used for any purpose for which an opinion may be used. Such a designation should be indicated at the end of the disposition when filed with the Clerk by the addition of the words "For Publication" on a separate line.

(e) Preliminary Determination to Publish. The preliminary determination whether the disposition should be published should be made at the first conference following oral argument, or if the disposition is made without oral argument, before it is filed with the Clerk.

(f) Request for Publication. Publication of any unpublished disposition may be requested by letter addressed to the Clerk, stating concisely the reasons for publication. Such a request will not be entertained unless received within 60 days of the issuance of this court's disposition.

(g) Periodic Notice to Publishing Companies. A list of all cases that have been decided by written unpublished disposition will be made available periodically to legal publishing companies for publication. The list shall include a notation as to the concluding disposition in each case, such as, e.g., "Affirmed," "Reversed," "Dismissed," or "Enforced."